



WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Public Testimony in Opposition to HB 402 Washington Metropolitan Area Transit Authority – Sovereign Immunity – Employee Whistleblower Protection

**Before the House Appropriations Committee
February 4, 2020**

Chairwoman McIntosh, members of the committee, thank you for allowing me to testify today. I am Charlie Scott and I work in the Office of Government Relations for the Washington Metropolitan Area Transit Authority. I am here to oppose House Bill 402 and to urge the committee to seek guidance from the Office of Counsel to the General Assembly before taking any action on this legislation.

WMATA was established in 1967 as an interstate compact agency created by the State of Maryland, District of Columbia and the Commonwealth of Virginia, with the consent of the U.S. Congress. The law creating WMATA were enacted in identical form by these three signatories and is also federal law.

Because the WMATA Compact is federal law, it preempts conflicting state law. The Fourth Circuit has held that “the WMATA Compact became federal law when consented to by Congress.”

WMATA v. One Parcel of Land in Montgomery Co., Md., 706 F.2d 1312, 1318 (4th Cir. 1983). The D.C. Circuit agrees. *See, e.g., KiSKA Const. Corp.-U.S.A. v. WMATA*, 167 F.3d 608, 609 (D.C. Cir. 1999) (“Congress consented to the WMATA Compact pursuant to [the Compact Clause], so the Compact has been transformed into federal law.”). Under black-letter preemption law, insofar as Maryland (or any other signatory) attempts to pass legislation inconsistent with the terms of the Compact, its efforts would be void, and a federal court could intervene to enforce the Compact’s terms notwithstanding contrary state legislation. *See* WMATA Compact, art. XVI, § 81 (giving federal district courts “original jurisdiction, concurrent with the Courts of Maryland, Virginia and the District of Columbia, of all actions brought by or against the Authority”); *cf. id.* § 84 (specifying that the Compact may be amended “by legislative action of any of the signatory parties *concurring in by all of the others*”) (emphasis added).

Indeed, the WMATA Compact itself exempts the Authority “from all laws, rules, regulations and orders of the Signatories and of the United States otherwise applicable to such transit service and persons, except ... laws, rules, regulations and orders relating to inspection of

equipment and facilities, safety and testing.” WMATA Compact, art. XVI, § 77. As a result, courts within each of the signatory jurisdictions have long invalidated attempts to apply a single signatory’s law to the Authority, even where each signatory jurisdiction had similar laws on the books (but outside of the Compact). *See, e.g., C. T. Hellmuth & Assocs. V. WMATA*, 414 F. Supp. 408, 409 (D. Md. 1976) (refusing to subject WMATA to Maryland’s disclosure laws because “one party [to an interstate compact] may not enact legislation that would impose burdens upon the compact absent the concurrence of the other signatories”); *Lucero-Nelson v. WMATA*, 1 F. Supp. 2d 1 (D.D.C. 1998) (refusing to apply the District of Columbia’s Human Rights Act to WMATA employees); *Malone v. WMATA*, 622 F. Supp. 1422 (E.D. Va. 1985) (refusing to enforce Virginia’s right-to-work law against WMATA);.

Furthermore, the signatories to the Compact conferred upon WMATA their sovereign immunity under the Eleventh Amendment. Immunity from laws and regulations of any one signatory, even when each signatory has similar laws that are enacted but not part of the Compact, has been consistently upheld by our courts. As the United

States District Court for the District of Maryland held in the case of *C. T. Hellmuth & Associates v. Washington Metropolitan Area Transit Authority*:

"Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties. It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories."

In addition, there are protections already in place for whistleblowers under both federal and state law. *See, e.g.*, Sarbanes Oxley Act, 18 U.S.C. § 1514A; Consumer Financial Protection Act of 2010, 12 U.S.C. § 5567; and Maryland False Claims Act, Maryland Code Ann., §§ 8-101, et seq. However, due to the sovereign immunity granted to WMATA by the signatories to the Compact, WMATA is immune from private causes of action arising under whistleblower statutes. Federal and state governments are not prevented from raising certain claims against WMATA, in the appropriate circumstances. Accordingly, remedies to protect against fraud and other activities already exist under federal and state law.

In addition, WMATA has a whistleblower policy (P/I 7.8.1/2) that protects WMATA employees who disclose information they reasonably believe evidences a violation of law relating to public transportation safety or security; waste, fraud, abuse of federal grants or other public funds intended to be used for public transportation safety or security; or a substantial and specific threat to safety and security conditions from fear of actual or threatened discrimination, retaliation or reprisal.

In prior years, when questions have been raised regarding potential conflict between proposed legislation and the WMATA Compact, the Office of Counsel to the General Assembly has been willing to provide guidance. I encourage this committee to seek such guidance before voting and urge an unfavorable report.



POLICY/INSTRUCTION: 7.8.1/2

WHISTLEBLOWER RIGHTS & RESPONSIBILITIES

SUPERSEDES: P/I 7.8.1/1

APPLICABLE TO: All Employees

METRO RESERVES THE RIGHT TO ELIMINATE, CHANGE, OR MODIFY THIS POLICY AT ANY TIME. ADDITIONALLY, THE LANGUAGE USED IN THIS POLICY SHOULD NOT BE CONSTRUED AS CREATING A CONTRACT OF EMPLOYMENT BETWEEN METRO AND ANY OF ITS EMPLOYEES OR OTHERWISE ALTERING AN EMPLOYEE'S AT-WILL EMPLOYMENT RELATIONSHIP WITH METRO.

1.00 PURPOSE

- 1.01 This Policy/Instruction (P/I) establishes the Washington Metropolitan Area Transit Authority's (Metro's) whistleblower rights and responsibilities and is designed to be in compliance with the National Transit Systems Security Act (NTSSA). Metro Employees must comply with this P/I as a condition of employment.
- 1.02 The public interest is served when Metro Employees report fraud, gross misuse or waste of public resources relating to public transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security, violations of law relating to public transportation safety or security, and substantial and specific threats of hazardous safety and security conditions without fear of actual or threatened discrimination, retaliation or reprisal. To support this interest, this policy prohibits retaliation against Metro Employees who engage in Protected Activity. By contract, Metro requires its contractors and subcontractors to comply with the NTSSA and afford their Employees similar rights and responsibilities.
- 1.03 Under the NTSSA, 6 U.S.C. § 1142, Metro, an officer or Employee of Metro, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an Employee for engaging in activity that is protected under the NTSSA. The United States Occupational Safety and Health Administration enforces the NTSSA and provides further information about the NTSSA via its website (<https://www.osha.gov/whistleblower>) and regional offices.
- 1.04 This P/I is not intended to prohibit Employees from filing complaints with external agencies, such as the Occupational Safety and Health Administration.
- 1.05 Nothing in this P/I shall be deemed or construed to constitute a waiver of Metro's sovereign immunity.

2.00 SCOPE

- 2.01 This P/I does not apply in absence of Protected Activity. Other workplace issues are governed by other Metro policies, procedures and collective bargaining agreements.
- 2.02 Nothing in this P/I shall diminish the rights or remedies of Employees pursuant to any applicable federal law, provision of the U.S. Constitution or other Metro P/I.

3.00 DEFINITIONS

- 3.01 **Complaint** - means an allegation of Prohibited Personnel Practice submitted to the Office of Inspector General.

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APPLICABLE TO: All Employees

- 3.02 **Employee** - means a current or former employee or contingent worker.
- 3.03 **Supervisor** - is an individual employed by Metro who has the authority to take, direct others to take, recommend or approve a Personnel Action or direct an Employee to obey an order.
- 3.04 **Personnel Action** means:
 - (a) recommending, threatening or ordering a termination, demotion, suspension, discipline, corrective action or reprimand, involuntary transfer or reassignment, investigation or examination, referral for psychiatric or psychological counseling, or any other action that would discourage a reasonable Employee from engaging in or supporting a Protected Activity;
 - (b) recommending, threatening or ordering a significant change in duties, responsibilities or working conditions inconsistent with the Employee’s job description, qualifications or training, which has a negative or adverse impact on the Employee; or
 - (c) recommending against, threatening against or failing to make an appointment, promotion or other favorable personnel action for an Employee.
- 3.05 **Prohibited Personnel Practice** - occurs when a Supervisor takes or threatens to take a Personnel Action against an Employee because of Protected Activity:
 - (a) the term “because of” in the above definition means that the Protected Activity engaged in by the Employee was a motivating factor in the Personnel Action, unless a different standard applies by operation of law.
 - (b) no Prohibited Personnel Practice occurs where management demonstrates it would have taken the Personnel Action in the absence of a Protected Activity.
- 3.06 **Protected Activity** - means lawfully and in good faith:
 - (a) making or being perceived as making a disclosure of information that an Employee reasonably believes is evidence of fraud, gross misuse or waste of public resources intended to be used for public transportation safety or security, violation of law relating to public transportation safety or security conditions in public transportation, or a substantial and specific threat to safety or security;
 - (b) refusing to obey an order that would violate legal requirements under the NTSSA;
 - (c) participating in or cooperating with an Investigation or Proceeding relating to a violation of any Federal law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security, and the investigation is conducted by:

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- (1) a Federal, State, or Local regulatory or law enforcement agency (including the OIG),
- (2) any Member of Congress, any Committee of Congress, or the Government Accountability Office; or
- (3) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;
- (d) engaging in activity protected by the NTSSA; or
- (e) seeking a remedy under this P/I or applicable law after engaging in a Protected Activity. An activity that is fully proscribed by another Metro policy (e.g., Equal Employment Opportunity (EEO), Americans with Disabilities Act (ADA), background checks) is not a Protected Activity under this P/I.

3.07 **Investigation or Proceeding** - is an inquiry or review by an authorized Metro official, or an authorized regulatory or law enforcement agency, regarding a Protected Activity or a Prohibited Personnel Practice, or an enforcement or judicial proceeding arising from such inquiry or review.

4.00 RESPONSIBILITY

4.01 Board of Directors. The Board is responsible to ensure that Metro is complying with the NTSSA and any other federal law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of federal grants or other public funds intended to be used for public transportation safety or security.

4.02 The Office of Inspector General (OIG) is delegated full authority with respect to preventing whistleblower retaliation under this P/I. OIG will establish and maintain procedures to implement this P/I, provided, however, that any modifications to this P/I shall be reported to the Board in a timely manner. OIG responds to reports of Unresolved Protected Activity that do not involve hazardous safety and security conditions. OIG shall review reports of suspected Prohibited Personnel Practices and, in collaboration with other offices, as needed, determine appropriate actions. OIG investigates Prohibited Personnel Practices and provides a report of investigation (ROI) to the Hearing Panel (Panel). OIG shall also maintain records regarding Prohibited Personnel Practices and Investigations and Proceedings and report on this information to the Board.

OIG will report to the Board (in executive session, as appropriate) information on the following:

- (a) Investigations and Proceedings, including trends and outcomes;
- (b) Panel actions on OIG Reports of Investigation (as provided by the Panel);
- (c) report of training of Employees and supervisors (as provided by the Department of Human Resources; and

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(d) report on regulatory proceedings or litigation that relate or refer to any Protected Activity or Prohibited Personnel Practices (as provided by the Office of General Counsel).

- 4.03 General Manager/Chief Executive Officer (GM/CEO). The GM/CEO is responsible for delegating management authority to qualified program officers and authorizing the re-delegation of authority to other qualified Employees of the Authority. GM/CEO is also responsible for establishing a system of accountability for responsibilities under this P/I. GM/CEO exercises this delegation authority as stated in the following parts of this section 4.
- 4.04 The Department of Human Resources (HR) shall provide written notice of the rights and responsibilities in this policy at all Employee orientations, post a notice of whistleblower rights and responsibilities under this policy and federal law electronically (such as by posting on Metro’s Intranet) and prepare a written notice for posting throughout Metro facilities. HR shall develop and implement training regarding this P/I and provide the OIG with periodic updates on the progress of training. HR shall collaborate with the Office of Fair Practices (FAIR), OIG and other offices to prevent Prohibited Personnel Practices.
- 4.05 The Office of Fair Practices (FAIR) shall, in partnership with OIG, HR, and other offices, take measures reasonably calculated to prevent Prohibited Personnel Practices, including notifying Supervisors of their obligation to prevent Prohibited Personnel Practices and informing Employees of the actions being taken to investigate Protected Activity.
- 4.06 The Office of General Counsel (COUN) shall provide legal advice to OIG, HR, FAIR, other offices, and the Panel in performing their functions under this P/I. COUN is also responsible for responding to any whistleblower complaint filed with an outside agency, and for providing the OIG with periodic updates on the progress of such regulatory proceedings or litigation.
- 4.07 The Department of Safety and Environmental Management (SAFE) shall investigate reported Protected Activities that involve threats to public transportation safety and security, maintain records of the outcome and documented closure of such Protected Activities, and immediately forward any safety or security hotline reports involving potential Prohibited Personnel Practices to the OIG.
- 4.08 The Chief Procurement Officer shall ensure that appropriate whistleblower protection provisions under the NTSSA are treated as federal flow down provisions and included in all appropriate Metro contracts.
- 4.09 The Chief Labor Relations Officer shall immediately forward any grievances involving potential Prohibited Personnel Practices to the OIG.
- 4.10 All Metro Departments and Offices shall provide any reports involving Prohibited Personnel Practices they receive to the OIG. They shall also collaborate to resolve issues underlying Protected Activities, support the investigation of Prohibited Personnel Practices’ and prevent Prohibited Personnel Practices. Departments and Offices shall actively support and fully cooperate with OIG investigations by providing requested documentation and all relevant information. In addition, Departments and Offices shall refer any whistleblower complaint filed

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with an outside agency to COUN for response and cooperate with COUN in preparing the response.

5.00 POLICIES AND PROCEDURES

5.01 Collaborating to Resolve Issues:

- (a) Metro encourages its Employees to share their questions, concerns, suggestions or complaints with someone who can address them properly. In most cases, an Employee's Supervisor is in the best position to address areas of concern.
- (b) When Employees encounter a situation they reasonably believe constitutes fraud, gross misuse or waste of public resources intended to be used for public transportation safety or security, violations of law, rule or regulation relating to public transportation safety or security, or substantial and specific threats to safety and security, they are encouraged to proactively and promptly resolve the issue first by following standard operating procedures. Supervisors will collaborate with Employees to resolve issues and elevate them within the chain of command as needed to reach a resolution.

5.02 Unresolved Protected Activity:

- (a) When collaboration and elevating an issue through the chain of command is impractical, or fails to achieve a resolution, Employees shall promptly report the Unresolved Protected Activity to SAFE (for substantial and specific threats of hazardous safety and security conditions) or OIG (for fraud, gross misuse or waste of public resources relating to public transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security, or violations of law relating to public transportation safety or security), through any reasonable means including in person, via email, other writing, including the SAFE hotline (202-249-SAFE) or OIG hotline (888-234-2374) and OIG email wmata-oig-hotline@verizon.net. Any other recipient of a report of Unresolved Protected Activity shall immediately forward it to OIG.
- (b) Employees shall act in good faith and make reasonable efforts to verify information when reporting Protected Activity. Employees shall not report or state an intention to report false information about Protected Activity or willfully or recklessly disregard the truth or falsity of the information or allegation.
- (c) Employees are encouraged but not required to put their names on reports of Protected Activity because appropriate follow-up questions and investigation may not be possible without knowing the source of the information. Knowing the source also helps Metro prevent Prohibited Personnel Practices and resolve underlying issues. Employees may, however, report Protected Activity anonymously or request confidentiality. When an

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Employee requests confidentiality, SAFE and OIG will make all reasonable efforts to protect the reporting Employee's identity and disclose confidential information only to the extent required by law or to conduct an Investigation or Proceeding.

- (d) The most appropriate response to Unresolved Protected Activity will depend upon the circumstances and on established OIG and SAFE processes. At a minimum, however, SAFE and OIG will confirm receipt of reports in their subject matter areas and advise of completion of investigation.
- (e) Any report of Protected Activity that includes an allegation of Prohibited Personnel Practice will be provided to the OIG for consideration under the process for investigating suspected Prohibited Personnel Practices.

5.03 Prohibited Personnel Practices:

- (a) Employees must not engage in Prohibited Personnel Practices. This P/I does not prohibit a Personnel Action that would have been taken in the absence of a Protected Activity.
- (b) Employees must not interfere with or deny the right of another Employee to engage in Protected Activity.

6.00 ENFORCEMENT

6.01 Violations of this P/I are subject to discipline up to and including termination.

6.02 Reporting and Investigating Suspected Prohibited Personnel Practices:

- (a) An Employee who believes that he or she has been subjected to a Prohibited Personnel Practice is encouraged, but not required, to attempt to resolve the matter within the Employee's chain of command. If the matter is not resolved, the Employee may submit a Complaint to the OIG through any reasonable means including in person, in writing through external or Metro internal mail, via email, or through the OIG hotline. If the Complaint is against the OIG, the Employee may submit it to FAIR, which shall assume the responsibilities of the OIG in this part.
- (b) Complaints are timely if submitted within 90 calendar days of the occurrence of the Prohibited Personnel Practice. The OIG may return untimely complaints with no further action.
- (c) A Complaint should contain as complete and specific information as possible, including facts and circumstances that demonstrate a Prohibited Personnel Practice, including:
 - (1) what Protected Activity the Employee engaged in, how it occurred, when it occurred, any witnesses to it, and any Investigation or Proceeding related to the Protected Activity;

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- (2) what the Prohibited Personnel Practice is, who took it, how it was made, when it was made, and any witnesses to it;
 - (3) what demonstrates that the Prohibited Personnel Practice was because of the Protected Activity; and
 - (4) any corrective action sought by the Employee prior to submitting a complaint to the OIG, and the response to that request.
- (d) Employees shall in good faith and must make reasonable efforts to verify facts before making a Complaint. Employees shall not report or state an intention to make a Complaint knowing it to be false or with willful or reckless disregard for the truth or falsity of the information or allegation.
- (e) OIG Investigation:
- (1) The OIG will acknowledge receiving a Complaint in writing within five (5) business days.
 - (2) The OIG shall make reasonable efforts either directly or through an appropriate office to provide the Complainant with the status of its investigation every 30 calendar days, and to provide a written report regarding a Complaint (ROI) to the Panel within 150 business days of receipt.
 - (3) All employees shall cooperate with Investigations or Proceedings, including providing necessary information and records.

6.03 Hearing Panel (Panel):

- (a) The Panel is comprised of two GM/CEO designees and a third neutral member chosen by the GM designees. COUN or designee provides legal advice to the Panel. The Panel receives ROIs regarding suspected Prohibited Personnel Practices, determines whether such Practice took place and directs corrective and remedial action. The Panel shall make reasonable efforts to render its determination within 45 business days of receiving the ROI. If the Complaint is resolved prior to the Panel issuing its determination, the Panel may dismiss the Complaint.
- (b) Management will comply with the Panel's determination within 14 business days.

6.04 Election of Remedies and Externally Filed Whistleblower Retaliation Complaints:

These procedures for Complaints are intended to supplement and not limit Employees' access to other applicable processes for redress of Prohibited Personnel Practices, including but not limited to, applicable federal law, another Metro P/I or grievance procedures under applicable collective bargaining agreements. If an Employee invokes another process, Metro may stay or close proceedings under this P/I.

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7.00 EXCEPTIONS

No exceptions, except where superseded by a grievance procedure in an applicable collective bargaining agreement. Nothing in this P/I shall diminish or enlarge the rights, responsibilities or remedies of Employees pursuant to any applicable federal law, provision of the U.S. Constitution or other Metro P/I.

8.00 RELATED POLICIES, REGULATIONS & RESOLUTIONS

8.01 Metro Board Resolutions 99-51, 2010-23, 2010-40, 2015-63 and 2019-12.

8.02 National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142.

9.00 LIST OF APPENDICES, ATTACHMENTS OR FORMS

9.01 For further information about whistleblower rights and responsibilities or any other topic related, please refer to the following links:

- (a) <https://www.whistleblowers.gov>.
- (b) <https://www.osha.gov/whistleblower>.

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